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Sovereignty Games, International Law and Politics

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2.1 Introduction

Our starting point for this volume is the interplay of different empirical developments: the expansion and transformation of international law, on the one hand, and the response of states in terms of their engagement with and contestation of international law, on the other. More specifically, we investigate how the proliferation, fragmentation, constitutionalization and deformalization of international law impact how states engage with and resist the rule of law. As the conceptual backdrop to the empirical starting point and analytical framework set out in Chapter 1, this chapter outlines the conceptual issues behind these observations and addresses some of the theoretical questions they raise about our understanding of the relationship between international law and politics, between rules and strategy and between legalization and sovereignty.

As alluded to in the previous chapter, the increasing legalization of the international realm entails not only the quantitative expansion of international law into ever more legal regimes but also a qualitative transformation of international law towards regulating issues like economic development, human rights and welfare, and thus increasingly undercutting the traditional separation of domestic and international affairs.[1] This separation is the backbone of how sovereignty, as a claim to supreme authority over a territory, traditionally operates. Domestic supremacy (internal sovereignty) is linked to a lack of such overarching authority in the international realm, where external sovereignty manifests itself in the principles of sovereign equality and non-intervention and the ability to regulate

[1] Other qualitative transformations of international law entail increasing resort to soft law, managerialism and risk management. See further below and Chapters 6 and 7, this volume.

and order international relations.[2] Insofar as these regulative principles are based on respecting every state's freedom and autonomy, the expansion of international law and in particular the shift to more substantive regulation and the international law of cooperation are often seen as an intrusion of states' sovereignty and political freedom. As Langford et al. suggest in Chapter 4, sovereignty appears to be giving way to governance, and politics to law. Yet, such an analysis, they point out, is built on a teleological perspective on the evolution of international society, which simply assumes that more international law (i.e. legalization) automatically constrains state behaviour and reduces power politics. Equally unsatisfying is the opposite view forwarded by, for example, International Relations (IR) realists and certain legal scholars that international law has little or no impact on sovereignty or politics. Neither perspective seems to capture the dynamics between international law and politics that we observe, as both these optics share a zero-sum conception of their relationship: either international law trumps politics (and curtails sovereignty) or politics trumps international law.

This presentation of international law and politics as mutually exclusive has a long-standing history and lies at the root of the disciplinary separation of IR from IL. As noted by one of IR's founding fathers, Hans Morgenthau, 'the political realist maintains the autonomy of the political sphere [and] thinks in terms of interest defined as power . . . the lawyer, of conformity of action with legal rules'.[3] In other words, politics is about power and strategy, law about rules and norms – and never the twain shall meet. While various approaches in both IL and IR have sought to analyze the relationship between politics and law since the 1970s, Morgenthau's division of labour has proven to be very tenacious. It has continued to inform subsequent attempts to bring IL and IR into contact again. A popular identification of the parameters of interdisciplinary cooperation sees it as a research agenda based on two fundamentally different 'optics' to studying international society – 'instrumentalist' versus 'rule governed' – within IR and IL, respectively.[4]

[2] F. H. Hinsley, *Sovereignty*, 2nd edn (Cambridge: Cambridge University Press, 1986).

[3] Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 3rd edn (New York: Knoff, 1966), 13.

[4] Robert O. Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harvard International Law Journal* 487–502. See also Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013).

Such a strict juxtaposition between strategy and rules, however, turns a blind eye to the dynamics that form the starting point of our current analysis: that the expansion and transformation of international law may enable states to recoup sovereign manoeuvrability. Not by rejecting or disregarding international law, but through active and strategic engagement with the structures and substance of international law. The basic observation that, in contemporary international society, politics is concerned with international law just as much as international law must be understood in relation to the society it seeks to regulate (rather than as a self-contained normative order) is hardly new. As highlighted by Judge Alvarez in the 1949 *Corfu Channel* case:

> Jurists, imbued with traditional law, have regarded international law as being of a strictly juridical character; they only consider what they describe as pure law, to the entire exclusion of politics as something alien to law. But pure law does not exist: law is the result of social life and evolves with it; in other words, it is, to a large extent, the effect of politics – especially of a collective kind – as practised by the States. We must therefore beware of considering law and politics as mutually antagonistic.[5]

Judge Alvarez essentially points to the need to move beyond a conceptualization of politics and law as mutually exclusive optics and instead appreciate how international law and politics constantly inform and transform each other.[6] Several scholars have followed this lead, eager to push on from Morgenthau's legacy. Distinctly different approaches to analyzing the relationship between politics and law in the international realm have thus emerged:[7] within IL, for instance, the New Haven school,[8]

[5] *Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania*), judgment of 9 April 1949, ICJ Rep, Individual Opinion Judge Alvarez, pp. 41–2.

[6] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014); Nikolas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016).

[7] For an (interdisciplinary) overview of different approaches, see Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (Oxford: Oxford University Press, 1996); Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000); Robert J. Beck, 'International Law and International Relations Scholarship', in David Armstrong (ed.), *Routledge Handbook of International Law* (Abingdon, UK: Routledge, 2009).

[8] See e.g. Myres S. McDougal, *Studies in World Public Order* (New Haven, CT: Yale University Press, 1960).

international legal process scholarship[9] and critical legal studies;[10] and within IR, for example, the English school,[11] regime theory,[12] the 'legalization debate'[13] and different branches of constructivism.[14] In addition, specific research agendas have emerged seeking to theorize the politics *of* international law.[15] While this diverse theoretical landscape within both disciplines carries many important insights, as reflected throughout the different chapters of this volume, it has also created somewhat of a turf war between different theoretical approaches and disciplines.[16] This in turn has hampered (inter)disciplinary dialogue and risks producing theory-promoting or theory-testing rather than problem-driven research.

To avoid this pitfall, the present chapter thus proposes a different avenue. In line with the above, the practices described in this volume may be seen to represent a particular kind of 'sovereignty game', where states respond to the developing rules and jurisprudence of international law. As a heuristic device, the sovereignty game metaphor serves to bring

[9] See e.g. Harold H. Koh, 'Why Do Nations Obey International Law' (1996) 106 *Yale Law journal* 2599–659.

[10] See e.g. Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard International Law Journal* 80–127.

[11] See e.g. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edn (London: Macmillan, 1995 [1977]).

[12] See e.g. Stephen D. Krasner (ed.), *International Regimes* (Ithaca, NY: Cornell University Press, 1983).

[13] See e.g. Judith Goldstein et al., 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385–99.

[14] See e.g. Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19–74; Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991).

[15] Key contributions to the development of the 'politics of law' agenda are Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4–33; Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004); Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7–19.

[16] In some cases this has led to outright rejections of interdisciplinary approaches altogether: Jan Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations' (2009) 23 *International Relations* 119–25; Jan Klabbers, 'Counterdisciplinarity' (2010) 4 *International Political Sociology*; Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3–34. See also Jeffrey L. Dunoff, 'From Interdisicplinarity to Counterdisciplinarity: Is There Madness in Martti's Method?' (2013) 27 *Temple International and Comparative Law Journal* 309–37; Tanja Aalberts, 'IR and the Challenges of Interdisciplinarity', in Andreas Gofas, Inanna Hamati-Ataya and Nicholas Onuf (eds), *The Sage Handbook of the History, Philosophy and Sociology of International Relations* (Thousand Oaks, CA: Sage, 2018).

attention to the interrelationship between players, rules and strategy. Employing this metaphor, the present chapter thus seeks to unpack the fundamental paradox of this volume: how the changing landscape of international law enables states to maximize their room for manoeuvre *within* the legal field, and both reclaim or disclaim sovereign authority. More specifically, the sovereignty game is a useful heuristic to explore the interrelationship between strategy and rules and move beyond their juxtaposition as different optics.

As is elaborated below, the notion of '(sovereignty) games' has further been employed by a range of different theoretical perspectives. Rather than staking out a particular position within this field or trying to resolve the different controversies among different theoretical approaches, the present chapter seeks to maintain a pluralist stance that – while obviously drawing on different scholarship within both IL and IR – does not self-identify with any specific position within the current field of IL-IR studies. Such a pluralist approach not only fits the empirical and problem-driven starting point of this volume as well as the diverse theoretical orientations of its contributors but also, we hope, opens up a space for fruitful academic exchange across theoretical perspectives in light of recent developments in international law.

2.2 Sovereignty Games

The notion of sovereignty games is a popular metaphor through which to analyze world politics.[17] As heuristic tools, metaphors help us to distil the key traits of a concept or activity and are particularly helpful when it comes to an elusive concept like sovereignty.[18] Interestingly, the game metaphor has been adopted by very distinct approaches, illuminating different aspects of the relationship between law and politics, as we discuss below. At a more general level, a focus on sovereignty games, or

[17] For analytical usages of the metaphor, see Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990); Georg Sørensen, *Changes in Statehood: The Transformation of International Relations* (Houndmills, UK: Palgrave, 2001); Tanja E. Aalberts, 'The Sovereignty Game States Play: (Quasi-)States in the International Order' (2004) 17 *International Journal for the Semiotics of Law* 245–57; Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond* (Houndmills, UK: Palgrave, 2008); Tanja E. Aalberts, 'Playing the Game of Sovereign States: Charles Manning's Constructivism *Avant-La-Lettre*' (2010) 16 *European Journal of International Relations* 247–68.

[18] See George Lakoff and Mark Johnson (eds), *Metaphors We Live By*, 2nd edn (Chicago: University of Chicago Press, 2003).

sovereignty as a game, is a useful metaphor by drawing our attention to three necessary elements of any game: players, rules and moves.[19]

First, who are the players involved? Who are the subjects of the sovereignty game? From a legal perspective, this seems a rather straightforward question, as within international law only states have a sovereign status, even if other subjects have gained some form of international legal personality. In practice, however, we witness other actors taking over sovereign prerogatives. This includes most palpably the European Union but also less obvious candidates like private security agencies, foreign investors and airflight carriers, who are now exercising powers that used to be firmly and exclusively in state hands.[20] Moreover, there has been increasing attention for the disaggregation of sovereignty, and the need to move beyond the focus on the state as a single actor, to the various government agencies that act in its name.[21]

The prism of this volume remains with states as the key players of the sovereignty game, but with a specific focus on how processes of legalization have changed the sovereign playing field as well as the state as actor and what it can do. This relates to the second element of the game metaphor: its characteristic as an activity defined by rules. Crucially, these rules do not merely regulate moves in the game but also constitute the game at a more fundamental level.[22] Without rules, there is no game. In terms of the sovereignty game, it is the rules of non-use of force and non-intervention (Articles 2(4) and 2(7) of the UN Charter) that are usually highlighted as the defining rules for the international society of sovereign states. But as already suggested by Friedmann, and elaborated below, these negative duties of co-existence have expanded into more positive and substantive duties. Rather than identifying this as the beginning of the end of sovereignty, the game metaphor directs us to a more nuanced position, distinguishing between the status as a sovereign player and the changing content of what it means to be a member of international society, based on the fundamental rules and principles that govern that society and the interaction between its members.[23] This in turn relates to making moves

[19] Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen, 'An Introduction to Sovereignty Games', in Adler-Nissen and Gammeltoft-Hansen, *Sovereignty Games*, pp. 1–17.

[20] See Chapters 4, 6, and 8, this volume.

[21] Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); see also Chapter 6, this volume, which contrasts Anne-Marie Slaughter's positive presentation of disaggregated sovereignty with its dark sides.

[22] John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995).

[23] Martti Koskenniemi, 'The Future of Statehood', 32 *Harvard International Law Journal* (1991), 397–410. Wouter G. Werner, 'State Sovereignty and International Legal Discourse',

in a game, as the third component of the game metaphor. The possible moves are defined by the rules of the game. This category also includes (but is not limited to) strategic play. Strategy can be defined as the skilled use of rules for specific purposes.[24]

This general heuristic of the sovereignty game, calling attention to players, rules and moves and strategies, enables us to move beyond the juxtaposition of law and politics and instead examine them as interwoven practices. Before we do so, the next section engages with different ways in which the game metaphor has been applied in analyses of world politics and international law, as the background theoretical discussion for our more specific analytical focus on sovereignty games to analyse the changing practices of international law.

2.3 Metaphors of Games

Casual references to the metaphor aside, the game metaphor is rooted in two different traditions within international studies and legal theory: rationalist game theory, which has inspired contemporary legal research through, notably, the work of Jack Goldsmith and Eric Posner,[25] on the one hand, and the Wittgensteinian notion of language games, which has inspired critical approaches in both IL and IR (notably through the work of Martti Koskenniemi and Friedrich Kratochwil, respectively),[26] on the other.[27] As is elaborated below, these traditions highlight different aspects of the politicization and instrumentalization of law that are the focus of this volume.

in Ige F. Dekker and Wouter G Werner (ed) *Governance and International Legal Theory* (Leiden: Martinus Nijhoff, 2004), 125–157. See also Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

[24] Gammeltoft-Hansen and Adler-Nissen, Introduction.

[25] Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

[26] The classical works are Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005 [1989]), and Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1991); see also Anthony Carty, 'Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein' (2012) 13 *Melbourne Journal of International Law* 1–20. The game metaphor has recently been used in a volume on interpretation in international law: Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford: Oxford University Press, 2015).

[27] See Tanja E. Aalberts, *Constructing Sovereignty between Politics and Law* (London: Routledge, 2012), Chapter 5, for a more elaborate discussion of these different traditions.

Probably the most well-known application of the game metaphor is so-called rational choice game theory. Originating in Economics, game theory has gained popularity within Political Science. The focus here is on different strategies that actors may pursue and different game scenarios, such as the Prisoner's Dilemma, Chicken Game and Battle of the Sexes. The imaginative starting point is that of states playing a game, adopting different strategic behaviour, occasional cheating practices and free interpretation or breaking of the rules in order to win the game or protect one's interests as best possible. With the emergence of Law and Economics as a separate field, as well as the interdisciplinary agenda with IR, this mode of analysis has also found its way into IL, notably through the work of Jack Goldsmith and Eric Posner.[28] In the elaboration of Goldsmith and Posner, economic models help to determine the power of law by measuring compliance based on state behaviour driven by state interests.

According to this approach, states only comply with international law to the extent that rules align with their political interests.[29] In their influential volume, Goldsmith and Posner argue that international law lacks (causal) force or effectiveness because it has no independent moral force. International law is thus epiphenomenal to power politics. Indeed, international law itself is the product of state interests: 'international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of power'.[30] Accordingly, a game theoretical approach to international law addresses the politics of international law by focusing on the 'why' question: why, and under what circumstance, do states comply with international law?[31] Located within rational choice thinking, the focus is usually on (given) material interests of states, although particular strands of constructivist research

[28] Douglas G. Baird, Robert H. Gertner and Randal C. Picker, *Game Theory and the Law* (Cambridge, MA: Harvard University Press, 1998); Goldsmith and Posner, *The Limits of International Law*; Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008). To be sure, law and economics is a broader school, and not all approaches are similarly focused on realist premises about individual state interest but rather foreground economic utility as a systemic or collective good and telos of international law. Goldsmith and Posner's volume, however, has gained most traction in the interdisciplinary debate with International Relations, precisely because of their affinity with realism.

[29] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

[30] Goldsmith and Posner, *The Limits of International Law*, p. 3.

[31] Critics conversely argue that such a framework has a built-in assumption of interest-driven behaviour (whatever a state does, it proves what state interest are as only interests drive state behaviour). Moreover, it assumes that rules speak for themselves. See e.g. Koskenniemi, 'Law, Teleology and International Relations'; Kratochwil, *Rules, Norms and Decisions*.

have broadened the agenda to also include the social context in which norms and interests operate.[32] In such a view, states may change their conception of their interests owing to, for instance, processes of socialization between members of international society.

A rather different approach to games emerges from critical approaches within both IL and IR, inspired by philosophy of language.[33] These scholars suggest that we should not only broaden our focus to look at different mechanisms for compliance, but ask *how* it is possible for states to comply with international law and *what* compliance means in the first place. For Koskenniemi, a crucial question for understanding the operation of international law is to ask 'what there is to comply with in the first place, what, of the many possibilities, is the preferable meaning of the rule, and should the rule be applied, or the exception?'[34] Such a perspective draws attention to the important role of contestation as part of increasing legalization and that such contestation as well as seemingly aberrant behaviour may serve a productive role vis-à-vis the validity and moral force of international law.[35] For instance, non-compliant behaviour may be justified by reference to rules themselves – e.g. by appealing to exceptional circumstances, hence confirming that in normal situations the rules do indeed apply.

The emphasis on justification and on viewing international law as an argumentative practice are characteristic of another application of the game metaphor,[36] drawing on Ludwig Wittgenstein's philosophy of

[32] E.g. Chayes and Chayes, *The New Sovereignty*; James Fearon and Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (London: Sage, 2002), 52–72; Martha Finnemore and Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *International Organization* 743–58, at 745. This rationalist-constructivist debate or even synthesis has been an important driver of the mainstream IL/IR agenda. See Dunoff and Pollack, *Interdisciplinary Perspectives*.

[33] See e.g. Kratochwil, *Rules, Norms and Decisions*; Kratochwil, *Status of Law;* Koskenniemi, *From Apology to Utopia*.

[34] Koskenniemi, 'Law, Teleology and International Relations', p. 17, italics ommitted; Kratochwil, *Rules, Norms and Decisions*; Kratochwil, *Status of Law*.

[35] Kratochwil, *Status of Law*.

[36] Koskenniemi, *From Apology to Utopia*, and Kratochwil, *Rules, Norms and Decisions*. Goldsmith and Posner discuss the communicative utility of law, whose formal and abstract language enables states to explain their policies and clarify their interests to an audience that does not share the same community (*The Limits of International Law*, pp. 182–84). As elaborated by linguistic approaches, language has a more constitutive function than being merely a communicative device.

language.[37] Wittgenstein compares language to making moves in a game to explicate that language is itself a form of action, a form of life, governed by rules.[38] In other words, he uses the game metaphor to illuminate the productivity of language, i.e. the role of language in constructing reality. Whereas this was an important and controversial insight for IR theory and its 'linguistic turn',[39] the power of language is common knowledge for both legal scholars and practising lawyers. Language and words, such as 'war' or 'genocide', produce distinct legal categories and effects. By labelling particular actions as (part of) an armed conflict, we enter into a different legal game, with specific rules of legal and illegal conduct.[40] In Wittgensteinian terms, the language and categories of international law are a form of action, they *do* something to reality. Moreover, like a language game, practices of international law are based on rules and conventions, which on the one hand describe possible moves and prohibit others, and on the other hand are flexible in that they do not dictate which specific course of action is taken.

Another element follows from this. To identify language as action means that words are not self-contained, but gain their meaning in practice: 'the meaning of a word is its use in the language'.[41] As H. L. A. Hart argues, rules do not speak for themselves, but can only be interpreted and applied in relation to concrete cases, and the open texture of general terms in language render international rules and obligations indeterminate.[42] In contrast to a positivist conception, critical approaches within both IL and

[37] Ludwig J. J. Wittgenstein, *Philosophical Investigations*, 3rd edn (London: Prentice Hall, 1958). Both Koskenniemi and Kratochwil rely on Wittgensteinian philosophy of language. See also Carty, 'Language Games of International Law'.

[38] Wittgenstein, *Philosophical Investigations*, para. 7.

[39] This linguistic turn was instigated in IR by Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989); Kratochwil, *Rules, Norms and Decisions*; and a special issue in (1990) 34 *International Studies Quarterly* 259–416.

[40] Tanja E. Aalberts and Wouter G. Werner, 'International Law and International Political Sociology', in Xavier Guillaume and Pınar Bilgin (eds), *The Routledge Handbook of International Political Sociology* (New York: Routledge, 2017), 40–41. See also David Kennedy, *Of War and Law* (Oxford: Oxford University Press, 2006).

[41] Wittgenstein, *Philosophical Investigations*, para. 43, see also paras 23, 83.

[42] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 121–44. In his later writings, Hart distances himself from this linguistic argumentation of indeterminacy and suggests that 'a legal system often has other resources besides the words used in the formulations of its rules which serve to determine their content or meaning in particular cases' (Hart, *Essays in Jurisprudence and Philosophy* [Oxford: Oxford University Press, 1993], pp. 7–8).

IR similarly reject the existence of a rule outside or beyond its interpretation. In other words, interpretation creates meaning, rather than discovers it.[43] If law is a linguistic activity and argumentative practice, the language game metaphor highlights that the meaning of international law – and hence international law itself – is produced through its usage. This becomes even more complex when the legal landscape is composed of a patchwork of overlapping regimes and transnational networks, operating in deformalized, highly pluralistic contexts where 'international norms [are] enforced through decentralized processes [by the] "international community"',[44] as the background of this volume's analysis.

A further point follows from this, namely that legal arguments are always made from particular subject positions with various interests and preferences at play.[45] Recall again Madeleine Albright's request for new lawyers in the Kosovo war.[46] This opens up a whole different venue to analyze the 'politics of international law'. As one of its significant contributions to international legal theory, critical legal studies lays bare how the inherent indeterminacy of the law gives a prominent place to political choices that not only drive legal practice, but constitute its meaning.[47] This also means that the juxtaposition of rules versus strategy is too crude to capture the interplay between politics and law. The success story of international law and the legalization of world politics does not rule out strategic engagement – states not only playing *by* but also *with* the rules and their international normative commitments.[48] However, as mentioned in

[43] Koskenniemi, *From Apology to Utopia*, p. 531. See also Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2013). This also means that the distinction between rule creation and rule application collapses. In addition, in *From Apology*, Koskenniemi further elaborates the power of discourse and the structure of legal argumentation in terms of a specific post-structuralist tradition of deconstruction. In Derridian fashion, he deconstructs the structure of legal argumentation as a system of conceptual differentiations that manifestly produces internal contradictions (see also Chapter 3, this volume). Koskenniemi, however, distances himself from the idea of radical indeterminacy based on semantic openness (Koskenniemi, *From Apology to Utopia*, p. 595). See also Iain Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism' (1991) 61 *British Yearbook of International Law* 339–62.

[44] Kennedy, *Of War and Law*, p. 91. See also Rajkovic et al., *Power of Legality*.

[45] See e.g. Chapters 3, 4 and 8, this volume. This focus on (state) preferences and interests is akin to rational choice theorists, even if the conceptualization of what these interests are differs. See Alexander Wendt, *A Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 113–38.

[46] Chapter 1, this volume. [47] See Chapter 3, this volume.

[48] In this context, critical legal studies identifies law as an instrument of hegemony and power. Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197–218; Eyal Benvenisti and George W. Downs,

Chapter 1, identifying the role of strategy is not the same as reducing international law to a tool for power politics and introducing realism through the backdoor. Indeed, the language game metaphor draws attention to the fact that 'rationality' involves a (dynamic) interpretation of one's situation, the normative context (what game are we playing, which rules apply?), and one's identity (what is my position within this game, what role do I play?).[49] In other (more abstract) words, actors, actions and objects obtain their meaning and identity in the context of a set of rules and practices that defines their interrelationships. The linguistic turn hence highlights the productive function of language by focusing on what it *does* – how interpretations shape (our knowledge of) the world, and how they render particular actions possible, obvious or legitimate, but also leave room for contestation of rules, their interpretation and applicability.

Together, this means that the usual juxtaposition of politics and law as a zero-sum game is too simplistic to capture the role of international law, its simultaneous expansion and contestation within contemporary global governance. Analyzing these dynamics requires a move beyond the focus on law as (not) constraining the behaviour of key actors, to analyzing its role as facilitating, enabling *and* disciplining politics.[50] Moreover, the (sovereignty) game metaphor invokes the idea of law as a practice, 'an activity, whose "being" is in the "doing" of the participants within the practice' (rather than a 'thing' as a given and self-evident body of rules), as will be elaborated in the next section.[51] This includes, but is not limited to argumentative practices or legal discourse. The current volume analyzes politico-legal practices more broadly, to identify specific strategies of political contestation *through* international law, to carve out the space of sovereignty politics in relation to the changing parameters of international law. Based on their different theoretical affiliations, the various chapters will provide different answers as to why and how states are doing this.

2.4 The Game of Sovereigns and International Law

Bringing these insights to bear on our discussion on changing practices of international law, we suggest that the notion of sovereignty games is a

'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595–631.

[49] See also Kratochwil, *Rules, Norms and Decisions*; Kratochwil, *Status of Law*.

[50] Michel Foucault, 'Truth and Power', in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Brighton, UK: Harvester Press, 1980), 109–33.

[51] Dennis M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative', in Dennis M. Patterson (ed.), *Wittgenstein and Legal Theory* (Boulder, CO: Westview Press, 1992), 87.

helpful tool to analyze the relationship between sovereignty, politics and law as mutually constitutive practices of international society. Building on our initial identification of the different elements of the sovereignty game, it highlights that sovereignty is not just about winning a game, and pursuing foreign policy goals and state interests, but also how to play, identifying which manoeuvres are possible or prohibited, and who gets to play, in the first place (i.e. moves, rules and players). In other words, apart from instrumental rules and tactics (i.e. the instructions given by a coach), games also entail constitutive rules which define which game we are playing, and who are the designated players (rules of recognition) and what moves can be made by different pieces/actors.[52] This also means that world politics can only be understood by taking the normative framework within which sovereign actors emerge and act into account.[53] Even if sovereignty is commonly identified with autonomy and freedom, this independence is not separate from the development of an international legal order, but produced in tandem. Not only is sovereign statehood inherently linked to changing membership rules of international society, its features of independence, autonomy and freedom are also themselves products of international law; they are a condition of specific political communities *according to* international law, to paraphrase Judge Anzilotti in the *Customs Union case*.[54] In other words, in international legal discourse, sovereignty is used to identify the legal status of a political community as an independent state.

In terms of our game metaphor, this also means that the role of international law within the sovereignty game entails more than just the regulation of international affairs between pre-existing state entities; it constitutes the very players of the game in the first place by legitimating their participation and empowering their international capacity, and by defining the parameters within which they can exercise their independence and sovereignty. These parameters include, but are not limited to, the basic rules of conduct for international

[52] Jackson, *Quasi-States*, pp. 34–5.

[53] Christian Reus-Smit, 'Introduction', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), p. 3.

[54] Separate Opinion of Judge Anzilotti to the *Austro-German Customs Union Case* (*Austria v. Germany*), Advisory Opinion, Permanent Court of Justice, PCIJ Series A/B, no. 41, 1931 (emphasis added). See also *Island of Palmas Case* (*Netherlands v. United States*), Permanent Court of Arbitration, 2 RIAA 829, 1928, p. 838.

intercourse, which entails both their freedom and rights, and their duties and obligations.[55] In other words, sovereignty can be conceived of as a specific way of ordering international life by linking freedom and responsibility.[56]

At the same time, the rules of the game are not carved in stone: the meaning of sovereignty, its legal scope and content, are produced in practice, i.e. in their usage. As pointed out by the Permanent Court in the *Nationality Decrees* case: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations'.[57] The development of international law means that such sovereign obligations or responsibilities have significantly expanded to include international obligations towards the state's own citizens, humans everywhere (as claimed by e.g. the Responsibility to Protect paradigm) and even towards non-personal entities such as the environment.[58] It is through the conceptual shift from sovereignty as autonomy and freedom to sovereignty as responsibility that we can understand state strategies that sometimes involve attempts to eschew their sovereign prerogatives, shift sovereign responsibility elsewhere or recoup sovereign freedom by engaging with the rules. This in turn means that the paradoxical outcome of the success of international law (in terms of its multiplication and expansion) can be law's complicity in organizing and creating irresponsibility.[59]

[55] 'This right [to exercise sovereignty and the functions of a State] has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nations in foreign territory'. *Island of Palmas Case* (*Netherlands v. United States*), Permanent Court of Arbitration, 2 RIAA 829, 1928, p. 839.

[56] Tanja E. Aalberts and Wouter G. Werner, 'Sovereignty beyond Borders: Sovereignty, Self-Defense and the Disciplining of States', in Adler-Nissen and Gammeltoft-Hansen, *Sovereignty Games*, pp. 129–50.

[57] *Nationality Decrees in Tunis and Morocco* (*Britain v. France*), PCIJ, Series B, no. 4, 1923, p. 24. For a historical analysis, see Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton, NJ: Princeton University Press, 1999).

[58] Tanja E. Aalberts and Wouter G. Werner, 'Mastering the Globe: Law, Sovereignty and the Commons of Mankind', in Rens van Munster and Casper Sylvest (eds), *Assembling the Planet: Post-War Politics of Globality* (New York: Routledge, 2016).

[59] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon, UK: Routledge, 2007). See also discussion in Chapter 3, this volume.

But the 'meaning in use' also plays at the level of interpretative struggles about the application of international law. This struggle does not take place in normative isolation, but among players that need to defend and justify their positions, whether during judicial proceedings before a court[60] or as part of everyday political practice, both within national parliaments and international diplomatic fora. Like any game, playing by the rules does not rule out strategizing.[61] As mentioned above, importantly, this focus on meaning-in-use and strategy should not be seen to introduce radical indeterminacy or instrumentalization-all-the-way-down through the back door. In fact, what counts as a strategic move is to a great extent determined (although not dictated) by the rules of the game. What is a strategic move depends on which game is being played and from which position. There is no rule in soccer that forbids a goalkeeper from moving at the frontlines; nevertheless, given the aim and rules of the game, s/he would be a fool to do so under normal circumstances. In Chapter 4, Langford et al. in this context distinguish between strategies that states engage with as the principal of international investment regimes and their tactics as litigant in front of an arbitration body.

Moreover, as a practice, strategizing in regard to policies and interpretation has to take account of the wider field of possible interpretations of a given issue. Consequently, by entering into the juridical field, governments have to accept 'the specific requirements of the juridical construction of the issue'.[62] Yet within this framework it is entirely possible to affect both the legal interpretation and framing of a particular issue as well as to organize political practices so as to avoid liability. Here too, strategy as such is not opposite to rule-play, but indeed dependent on knowledge of the rules (*know-what*) as well as the skills for engaging in legal argumentation (*know-how*). In Chapter 6, Mann refers to legal practice as lawyerly craft, to encompass both the element of skilled use, the art or professional practice of doing law, *and* the element of cunning and strategizing. Government legal advisors become the crucial intermediaries in this interplay between politics and international law – at once deciphering the boundaries of legitimate political action and actively engaging in

[60] See Chapters 4 and 5, this volume.
[61] Cf. Wittgenstein, *Philosophical Investigations*, para. 85.
[62] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805–53, at 831.

devising creative solutions to ensure that these boundaries are not static but negotiable.

2.5 The Legal Room for Manoeuvre

The overall argument of this volume is that the expansion of international law into a complex web of overlapping legal regimes provides further leverage for playing the sovereignty game, regaining sovereign power while at the same time disclaiming sovereign responsibility. As Baumgärtel shows in Chapter 5, this 'legislative patchwork' can be used creatively not only prior to legal procedures (in the case of judicial forum shopping), but also during court proceedings, as well as in post-judgment positioning. Moreover, as the chapters in this volume collectively show, the combined quantitative and qualitative transformation of international law – from positivist rules to a wider variety of legal instruments, including soft law such as codes of conduct and Memoranda of Understanding – further facilitate strategic engagement, or navigating the room for semi-compliance, as Langford et al. formulate it with regard to international investment regimes in Chapter 4. The varied patchwork of legal regimes, institutions and instruments enables the invocation of one register of international law against another, not to disregard or violate legal norms, but to avoid it by 'comply[ing] with other law – while at the same time thwarting law's stated normative commitments'.[63] The result, as Brummer provocatively suggests in Chapter 3, is law's complicity in organizing and creating irresponsibility. Together the case studies show how the expansion of international law has not eliminated politics, but transformed its operation as states are now pursuing their foreign policy goals through a variety of legalized strategies that mobilize international law in sophisticated ways in order to mitigate its constraining effects while legitimizing international politics.

Thus, we have moved from the identification of rules and strategy as two separate optics on the workings of international politics and law,[64] to their workings as intertwined aspects of international law as an argumentative practice in international society. And crucially, as this volume shows, the politics of international law works both ways.[65] The

[63] Chapter 6, this volume, p. 131. [64] Keohane, 'Two Optics'.
[65] Reus-Smit, 'The Politics of International Law', p. 14.

recent discussion on lawfare is only the most outspoken illustration of how law has become an integrated part of world politics, a *sine qua non* for doing and justifying foreign policies and politics.[66] Indeed, in Chapter 5, Baumgärtel suggests that finding ways to manage the courts has now become part of the game of policy making. The case studies in this volume demonstrate that despite their desire to ensure greater political manoeuvrability in regard to international law, states nonetheless go to great lengths to find solutions that maintain a certain degree of legal legitimacy.

A key question in examining the current range of practices in regard to international law is thus what makes certain policy options appear unviable from the perspective of governments? The very resort to 'exceptionalism' and creative policy measures suggest that at least under some circumstances international law sets certain boundaries that states accept as being beyond dispute. Indeed, as aforementioned, calling upon an exception reinforces the discursive power of international law as the framework and vocabulary for international intercourse. At other occasions, states can try and push the legal boundaries through creative legal argumentation – such as the revival or corpus theory developed by the US allies to try and justify the Iraq intervention by relying on the body of resolutions issued by the UN Security Council in the 1990s, or the infamous torture memos by the Bush administration. Rather than calling upon the exception as a way to suspend international law in the face of vital threats to global security, these are practices of legal representation, trying to embed security practices within the law.[67] The shift to risk management, and the transferral of the 'precautionary principle' from international environmental law to the field of security in the war on terror, further stretches the legal register, as does the international law's move towards managerialism, incorporating non-legal experts' vocabulary of 'reasonableness', 'ethics', or 'efficiency' as part of legal reasoning.[68] As Ellis argues in Chapter 7, this is at least partly the effect of making the crafting and application of its

[66] Kennedy, *Of War and Law*; Wouter G. Werner, 'The Curious Career of Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 61–72.

[67] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013). See also Chapter 3 (on the legal creation of extraterritorial zones) and Chapter 6 (on the legal design of global mass surveillance), this volume.

[68] Kennedy, *Of War and Law*; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1–30. See also the symposium on 'The Risks of International Law' (2008) *Leiden Journal of International Law*

specialized norms heavily dependent upon scientific expertise, or what in our typology is referred to as 'extralegal deferral'.[69]

2.6 Conclusion

Rather than assuming that power politics always trumps international law, or vice versa, assuming that the expansion of international law constrains and disciplines the operation of sovereign power unidirectionally, this chapter argues that we need to understand how international law, sovereignty and the operation of power are intimately intertwined and that, accordingly, we need to engage in empirical investigations of how players, notably states, proceed when they encounter the expansion of international law into diverse areas and different modalities, how states put the rules to practices and relate them to their actions.[70] In this chapter, the sovereignty game serves as a heuristic starting point for more generally examining how the expansion of international law goes hand in hand with changing state practices and increasing – rather than diminishing – politico-legal manoeuvrability.

The game metaphor also highlights that sovereignty cannot be reduced to freedom and autonomy, rights and duties alone, as it is about status (being a player in the game) as much as it is about competences. From the above discussion, it is clear that we see neither sovereignty nor international law as something given. This includes not only the volume's focus on the quantitative and qualitative transformations of international law, but also a move beyond international law as only a body of rules, to a focus on how these rules come to life through sovereign practices (and vice versa). As outlined in the preceding chapter, different developments of international law have indeed changed the playing field for members of the international society, leading many states to engage more profoundly and creatively with this normative corpus in order to retain or recoup room

21(4), 783–884. Chayes and Chayes, *The New Sovereignty* proposes a managerial approach to increase state compliance with international law.

[69] See also the symposium on 'Expertise, Uncertainty, and International Law' in (2013) *Leiden Journal of International Law* 26(4), 783–854, and Wouter G. Werner, 'The Politics of Expertise: Applying Paradoxes of Scientific Expertise to International Law', in Monika Ambrus et al. (eds), *The Role of Experts in International and European Decision-Making Processes. Advisors, Decision Makers or Irrelevant Actors?* (Cambridge: Cambridge University Press, 2014), 44–62.

[70] Kratochwil, *Status of Law*, p. 54.

for sovereign manoeuvre. The following chapters analyze these politico-legal practices in the field of human rights litigation, international investment regimes, environmental law, global mass surveillance, irregular boat migration and extra-territorial detention.